

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

GREGORY DAVID WILLIAMS,

Respondent.

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Supreme Court #SC93305

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

PROCEDURAL HISTORY

May 1, 2012	Information
May 25, 2012	Respondent's Answer to Information
June 18, 2012	Appointment of Disciplinary Hearing Panel
September 28, 2012	Initial DHP proceeding
November 26, 2012	First Amended Information
November 26, 2012	Respondent's Answer to First Amended Information
November 27, 2012	DHP Hearing
February 13, 2013	DHP Decision
February 25, 2013	Acceptance of DHP decision by Informant
March 7, 2013	Rejection of DHP decision by Respondent
April 15, 2013	Record submitted

BACKGROUND

Respondent Williams was licensed to practice law in the State of Missouri in September of 1984. Until 1988, Respondent practiced law in Springfield, Missouri. Since 1988, Respondent has practiced law in the Lake of the Ozarks area, most particularly in and around Sunrise Beach, Missouri. **App. 23, 30; App 42 (Tr.61).**¹

¹ The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the trial in this matter conducted on September 28 and November 27, 2012. Citations to the trial testimony before the Disciplinary Hearing

Respondent has his own law firm. He has had as many as five licensed attorneys in the past in his law firm, having that number as late as 2006. **App. 102 (Tr. 298-299)**. From 2006 forward, the number of lawyers in Respondent's law firm has declined, primarily because of a drop in real estate related transactions. **App. 102 (Tr. 299)**. A significant part of Respondent's practice over the years has been related to real estate. By September 2009, Respondent had only two other lawyers in his firm. **App. 102 (Tr. 299)**.

In the past, Respondent has owned a title company and has owned water companies. He has developed real estate subdivisions, has sold lake lots, and has years of experience handling real estate transactions. **App. 42 (Tr. 61)**.

DISCIPLINARY HISTORY

Respondent has a prior disciplinary history. He received an Admonition dated May 2, 2001, for violation of Rule 4-1.9(a), a conflict of interest rule involving a former client. Specifically, after representing a husband and wife in drafting an estate plan, Respondent later drafted a beneficiary deed for the husband alone that had the effect of changing the distribution to the wife as set forth in her estate plan. Informant

Panel are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example "**App. ____ (Tr. ____)**". Citations to the Amended Information, Respondent's Answer to the Amended Information and the hearing exhibits are denoted by the appropriate Appendix page reference.

admonished Respondent for representing the husband in a substantially related matter with the representation being materially adverse to the wife's interests. **App. 226-227.**

THE BOOTHE REPRESENTATION

Complainant Robert Boothe. Robert Boothe is 46 years old. He was born and raised in the State of Virginia, where he lived most of his life. Mr. Boothe moved to Missouri in 2008. **App. 67 (Tr. 159-160).**

Mr. Boothe has been considered disabled by the Social Security Administration since he was 22 years old and receives total Social Security Disability payments of \$548 per month. **App. 68 (Tr. 163-164).** Respondent is disabled because he is bipolar with schizophrenic tendencies. **App. 68 (Tr. 164).**

Mr. Boothe has a significant criminal history. **App. 76 (Tr.195-197).** He has a felony conviction for statutory rape in 1985 and a felony conviction for robbery in 1990, both in the State of Virginia. **App. 67-68 (Tr. 161-162); App. 212-225, 240-245 .** Respondent is a registered sex offender in the State of Missouri. **App. 246.** Mr. Boothe has had several other criminal convictions, including driving under the influence and possession of marijuana. **App. 69-70 (Tr. 169-170).**

In or about 2006, Mr. Boothe received an inheritance of approximately \$165,000 from the death of a relative in the State of Virginia. **App. 70 (Tr. 171).** Mr. Boothe used part of that money to purchase three parcels of property in the State of Missouri. Two of those properties were purchased with cash down payments and then borrowing the remaining balances. Mr. Boothe gave Deeds of Trust to secure promissory notes for those purchases. **App. 69 (Tr. 167-169).**

One of the two properties which Mr. Boothe borrowed money against is a lot and house on the north shore of the Lake of the Ozarks, which Mr. Boothe has been fixing up ever since. The other parcel on which money was borrowed is a five and one-half acre tract of land in the Sunrise Beach area where Mr. Boothe currently lives in a trailer. Mr. Boothe still owns both parcels of property. **App. 69 (Tr. 167-169).**

The third parcel of property purchased by Mr. Boothe was a lakefront lot known as Lot 9 of Kip's Cove, purchased on or about September 9, 2008 for a purchase price of \$63,500. **App. 69-70 (Tr. 168-171).** The contract for vacant land listed the purchase price of \$63,500. **App. 228-235.** Mr. Boothe closed on the purchase of the property on September 9, 2008, with a settlement statement showing a total amount of cash paid by Mr. Boothe at closing of \$63,920.50. **App. 236-237.**

Mr. Boothe owned Lot 9 of Kip's Cove free and clear after September 9, 2008, subject only to his obligation to pay real estate taxes. There was no Deed of Trust on the property. **App. 70 (Tr. 170-171).** At the time of purchase by Mr. Boothe, Lot 9 of Kip's Cove was appraised in the office of the Camden County Assessor as having a value of \$46,200. **App. 64 (Tr. 149).**

Events of September 2009. Mr. Boothe was arrested on September 5, 2009 by an officer of the Missouri State Water Patrol for having expired registration on his boat, being in possession of a Schedule IV controlled substance without a prescription, possession of less than 35 grams of marijuana, and drug paraphernalia. **App. 70 (Tr. 172-173); App 256-270.** Mr. Boothe was transported to the Camden County Jail with bond set at \$40,000. **App. 70-71 (Tr. 173-174); App 263-264.**

Mr. Boothe owned the aforesaid three properties, but had no cash money or liquid assets. He had spent the remainder of his inheritance and had insufficient funds from his monthly disability check and any odd job income to bond out of jail. **App. 70 (Tr. 171); App. 71 (Tr. 174).**

Mr. Boothe was unable to obtain the services of a public defender because he owned real estate. While in jail, Mr. Boothe spoke to a bail bondsman, Bill Snyder, who suggested that Mr. Boothe contact Respondent's law office. **App. 71 (Tr. 174).**

Mr. Boothe had been in jail since September 5, 2009 when he called Respondent's office on the morning of September 8, 2009 and spoke to Dana Martin, an attorney then working as an associate at Respondent's office. Mr. Boothe told Ms. Martin he had no cash whatsoever but owned property worth about \$200,000 that he hoped to use as security. **App. 71 (Tr. 174-176); App. 412.²**

² Dana Martin is a licensed attorney in the State of Missouri, having been licensed in 1998. She worked for several years for the Missouri Public Defender's Office and then worked for Respondent from 2006 until October 2009. After taking the initial phone call from Mr. Boothe, Ms. Martin later may have appeared in court in Mr. Boothe's case, but never had any further discussions with Mr. Boothe about fees or property to secure those fees, nor was she ever present when Respondent and Mr. Boothe talked about fees. Ms. Martin never witnessed any documents signed by Mr. Boothe and/or Respondent regarding the attorney/client relationship. **App. 94-96 (Tr. 266-276).**

Respondent received an email from Dana Martin sent on September 8, 2009 at 11:03 A.M. advising him that Mr. Boothe was in jail, had no cash, but owned property supposedly worth about \$200,000 and wanted to make arrangements for use of the property as security. Respondent sent an email back to Ms. Martin at 11:21 A.M. on that same date of September 8, 2009, noting that Mr. Boothe was charged as a prior and persistent offender, and stating he was thinking \$10,000 for a fee with a Note and Deed of Trust on the property. **App. 412.**

Respondent had not yet met with Mr. Boothe, or communicated with him in any way, at the time of the emails on September 8, 2009 when he talked of a \$10,000 fee with a Note and Deed of Trust on the property. **App. 43 (Tr. 62).**

Andrew Curley, an attorney licensed in 2008, was an associate in Respondent's office in September of 2009. Respondent directed Mr. Curley to go to the Camden County Courthouse to obtain information on Lot 9 of Kip's Cove, including whether it was owned by Mr. Boothe free and clear of any deed of trust. **App. 43 (Tr. 63-65).**

Edward Whitworth, Assessor for Camden County, Missouri, testified that Lot 9 of Kip's Cove had an appraised value of \$46,200 in September of 2009. **App. 64 (Tr. 149).** That appraised value was a matter of public record and available for anyone from the public to ascertain. **App. 64 (Tr. 147-148).** The Appraiser's office regularly receives telephone calls from lawyers, realtors, and members of the public to obtain a general idea about the value of property. The Assessor's office does not keep a record of telephone calls, either now or back in September of 2009.

Respondent visited Mr. Boothe in the Camden County Jail on or about September 8, 2009. Mr. Boothe told Respondent he owned property at Lot 9 of Kip's Cove free and clear.³ **App. 71 (Tr. 176-177).**

Mr. Boothe at some date signed a Future Advance Deed of Trust and Security Agreement giving Respondent a security interest in Lot 9 of Kip's Cove. **App. 172-175.** The Future Advance Deed of Trust and Security Agreement is dated September 8, 2009, but both Respondent and Mr. Boothe concede that the document was not signed by Mr. Boothe on that date.

Mr. Boothe testified that the Future Advance Deed of Trust and Security Agreement was signed by him at the Camden County Jail. **App. 71 (Tr. 177).** Mr. Boothe testified that Respondent brought with him a set of documents to the jail, placed them in front of Mr. Boothe and asked Mr. Boothe to sign them. **App. 72 (Tr. 178-179).** Mr. Boothe questioned what would happen if he signed the Deed of Trust. **App. 72 (Tr. 178-179).** Respondent never told Mr. Boothe that Mr. Boothe had the right, or should be

³ The exact dates and number of meetings between Respondent and Mr. Boothe at the Camden County jail regarding fee arrangements is a matter of dispute in this case. Respondent says they met in the jail on September 8, 2009, at which time Respondent states Mr. Boothe entered into a Client Minimum Fee Agreement dated September 8, 2009 and an installment Fee Agreement, also dated September 8, 2009. **App. 167-170, 247-250.** The date or dates Respondent and Mr. Boothe entered into the Client Minimum Fee Agreement and the Installment Fee Agreement is insignificant.

given the opportunity, to consult independent counsel, before signing the Deed of Trust. **App. 72 (Tr. 180).**

At the jail Mr. Boothe told Respondent that Respondent would not have to worry about his fee, that “in Virginia where (Mr. Boothe) was from usually you are made to sell the property at any reasonable offer or auction it and most of the time the Judge won’t let it go too low.” **App. 311.** He asked Respondent “to please as my attorney advise me as to sign or not, being bound by the bar to protect my best interest.” **App. 311.** Mr. Boothe executed the Future Advance Deed of Trust and Security Agreement. **App. 71 (Tr. 176-177).** At the time he executed the document, Mr. Boothe believed that before he could lose the property there would be some sort of judicial foreclosure. **App. 72 (Tr. 179).**

The Future Advance Deed of Trust and Security Agreement shows a notarization by Jennifer Jackson, a Notary Public, dated September 8, 2009, with a notarized statement that states as follows:

“On this 8th day of September, 2009, before me, Jennifer Jackson, a Notary Public, personally appeared Robert Boothe, a single person, known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.” **App. 175.**

Jennifer Jackson, in 2009, was a secretary to Respondent and remains his secretary to this date. **App. 88 (Tr. 243).**

Ms. Jackson testified that she never has gone to the Camden County Jail to notarize a document, does not remember Mr. Boothe coming to Respondent’s office to

execute the aforesaid Future Advance Deed of Trust and Security Agreement, and does not know when the document was executed.⁴ **App. 89-90 (Tr. 246-253).** Ms. Jackson testified that she backdated the document to September 8, 2009 because she thought she had to, given the date listed on the minimum fee contract and the installment fee contract of September 8, 2009. **App. 90 (Tr. 253).**

Respondent testified that Mr. Boothe signed the Future Advance Deed of Trust and Security Agreement in Respondent's office at a later date after Mr. Boothe had bonded out of jail. Respondent gave detailed testimony about where people were sitting at the conference room in Respondent's office, the presence of Jennifer Jackson, and Mr. Boothe's execution of the document that date. **App. 48 (Tr. 82-83); App. 50 (Tr. 92-93).**

At some point after September 10, 2009, Mr. Boothe with Respondent's assistance was able to obtain a reduction of his bail bond to \$20,000. At that time Mr. Boothe was able to bond out of jail by paying bail bondsman Bill Snyder \$2,000, the 10% payment required by the bondsman so Mr. Boothe could get out of jail. Mr. Boothe was able to secure the \$2,000 in cash by pledging as security a motorcycle which he owned and had purchased for \$8,000. **App. 83 (Tr. 223-224); App. 86 (Tr. 237).**

⁴ Ms. Jackson brought her notary signature book to the hearing of this case on November 27, 2012. The notary signature book has no listing of a Future Advance Deed of Trust and Security Agreement signed by Mr. Boothe. **App. 91 (Tr. 256).**

Mr. Boothe's testimony, as well as his written statements to the Office of Chief Disciplinary Counsel, demonstrate that Mr. Boothe is inarticulate, sometimes contradictory and confusing, and had little knowledge of the true significance of the legal consequences of his execution of the Future Advance Deed of Trust and Security Agreement in September of 2009. **App. 309-315.**

Respondent failed to look at the property known as Lot 9 of Kip's Cove in September of 2009. He did not look at the property until in or about December 2010 (just prior to the date he ultimately foreclosed on it) and testified that at the time he finally looked at the property he was surprised it wasn't worth as much as he thought. **App. 53-54 (Tr. 102-108).**

In September of 2009, when Respondent prepared and had Mr. Boothe execute the Future Advance Deed of Trust and Security Agreement, Respondent believed that the value of the property at Lot 9 of Kip's Cove was sufficient to pay his contemplated attorney fees in the case. **App. 43 (Tr. 64-65).**

Events after September 2009. The Future Advance Deed of Trust and Security Agreement was not recorded until May 6, 2010. **App. 172.** The reason the Deed of Trust previously had not been recorded was by mistake, there being an email from Debbie Williams, Respondent's wife, on May 6, 2010 stating "Jen notarized it and did not record it because no one directed her to." **App. 411.**

Mr. Boothe remained free on bond until May of 2010. At that time his bond was revoked because of a new arrest for alleged possession of marijuana. Mr. Boothe was returned to the Camden County Jail and remained there until his plea of guilty on June

23, 2010. **App. 72 (Tr. 182-183); App. 218, 271-283.** Respondent was able to negotiate a suspended imposition of sentence on Mr. Boothe's Class C felony of possession of a controlled substance, despite Mr. Boothe's status as a persistent offender. Further, Respondent was able to negotiate a misdemeanor conviction on Mr. Boothe's marijuana possession with punishment assessed at 60 days confinement, most of which Mr. Boothe already had served at the time of his plea. Mr. Boothe acknowledged that he received good representation and a favorable disposition of his criminal case. **App. 68-69 (Tr. 164-167); App. 84 (Tr. 228-229).**

Respondent's attorney fees and expenses for representation of Mr. Boothe totaled \$9,682.20. Mr. Boothe acknowledged those fees and expenses were reasonable for the representation. **App. 178, 502.**

Mr. Boothe never paid Respondent for representation. **App. 503.** Mr. Boothe sent letters to Respondent dated July 19, 2010 and September 27, 2010. **App. 176, 177.** In both instances Mr. Boothe said he would pay some money as soon as he got an income tax refund and also would make other monthly payments. **App. 73 (Tr. 183).**

Respondent sent a letter to Mr. Boothe dated September 2, 2010. **App. 178.** In that letter Respondent advised Mr. Boothe that Respondent would "commence collection action effective September 30, 2010, including the foreclosure on the property listed, Lot 9 Kip's Cove". Respondent foreclosed on the property known as Lot 9, Kip's Cove and purchased the property at foreclosure sale on January 11, 2011 for \$5,000. **App. 179-180.**

Mr. Boothe, despite receiving legal notice of foreclosure, was confused about the significance of the legal proceeding. Mr. Boothe thought foreclosure would involve a court proceeding wherein a Judge would assure that, at a minimum, proper value was given for sale of the property. Mr. Boothe's analysis of the law was incorrect. Nonetheless, Respondent never gave Mr. Boothe the opportunity, when executing the Attorney/Client Minimum Fee Agreement, the Installment Fee Agreement and the Future Advance Deed of Trust and Security Agreement back in September of 2009, to consult with independent counsel regarding the legal significance of the documents he was signing.

Five months after he obtained title to Lot 9 of Kip's Cove by Trustee's Deed, Respondent sold the property to his secretary, Diane Lucash and her husband Thomas, for \$15,000. **App. 46 (Tr. 76-77)**. Respondent did not advertise Lot 9 of Kip's Cove for sale, did not have a realtor, did not list the property for sale on the internet, did not list the property for sale in a newspaper, and did not have the property appraised before the sale to Mr. and Mrs. Lucash. **App. 46-47 (Tr. 77-79)**.

Respondent's fees and expenses for representation of Mr. Boothe, plus additional expenses, involving the foreclosure, totaled approximately \$12,000. That included his fee bill to Mr. Boothe (\$9,682.20) [**App. 178**] his payment of real estate taxes on the property at Kip's Cove for the 2009 tax year (\$398.35) and the 2010 tax year (\$347.96) [**App. 210-211**], publication costs for the foreclosure notice (\$184) [**App. 424**], title costs, and attorney fee services for the foreclosure. **App. 62 (Tr. 139-140)**. Respondent

testified that he had \$2,000 in foreclosure costs associated with the foreclosure on the Kip's Cove property. **App. 62 (Tr. 139).**

Mr. Boothe lost the Kip's Cove property for which he had paid \$63,500. Mr. Boothe was injured by that loss – at least as to the difference between the value of the property and the amount of fees owed to Respondent.

THE DISCIPLINARY HEARING PANEL DECISION

On February 13, 2013, the Disciplinary Hearing Panel filed its decision recommending that this Court issue an order indefinitely suspending Respondent from the practice of law with leave to apply for reinstatement after six months. **App. 564-589.** In so recommending, the Panel made the following findings of fact and conclusions of law:

- While noting that the date and location where the Future Advance Deed of Trust was signed by Mr. Boothe remains unclear, the Panel found that Respondent provided inconsistent testimony and statements regarding the events surrounding the execution of the Deed of Trust. **App. 572.**
- The Panel found that Respondent never gave Mr. Boothe the opportunity, when executing the Installment Fee Agreement and the Future Advance Deed of Trust and Security Agreement in September 2009, to consult with independent counsel regarding the legal significance of the documents he was signing. **App. 575.**
- The Panel found that Respondent never obtained an informed written consent from Mr. Boothe prior to the execution of the Future Advance Deed of Trust. **App. 575.**

- The two lawyer members of the Disciplinary Hearing Panel, each of whom has practiced law in excess of 20 years, noted that “neither has ever considered taking an interest in a client’s property as security for future legal services nor, to our knowledge, has anyone with whom we are or have been associated.” **App. 578.**
- The Panel found that Respondent violated Rule 4-1.8(a) by taking a security interest in his client’s property without advising the client in writing of the desirability of seeking and being given a reasonable opportunity to seek the advice of independent counsel before executing the Future Advance Deed of Trust. **App. 579.**
- The Panel found that Respondent violated Rule 4-1.8(a) by taking a security interest in his client’s property without obtaining his client’s informed written consent to the business transaction before executing the Future Advance Deed of Trust. **App. 579.**
- The Panel found that Respondent violated Rule 4-8.4(d) by engaging in conduct prejudicial to the administration of justice in his financial dealings with Mr. Boothe. **App. 580-581.**
- The Panel found that Respondent’s secretary, Jennifer Jackson, improperly notarized and backdated Mr. Boothe’s signature on the Future Advance Deed of Trust and that Respondent thereby violated Rule 4-5.3(b) by failing to make reasonable efforts to ensure that his staff’s conduct was compatible with Respondent’s professional obligations. **App. 581.**

- The Panel found that the following aggravating factors were present:
 - Respondent has a prior disciplinary history;
 - Respondent has refused to acknowledge the wrongful nature of his conduct;
 - Respondent's client was in a vulnerable position, being (i) in jail without liquid assets, (ii) on full Social Security disability due to bipolar disorder with schizophrenic tendencies;
 - Respondent had substantial experience in the practice of law. **App. 586-587.**
- In mitigation, the Panel noted Respondent's testimony that he no longer engages in business transactions with his clients similar to that involved in this case. The Panel noted, however, that Respondent did not acknowledge remorse or that his conduct in dealing with Mr. Boothe was wrong. In summary, the Panel found that aggravating factors outweigh mitigating factors in this case. **App. 588.**

Following an analysis of relevant decisions from this Court and the ABA's Standards for Imposing Lawyer Sanctions, the Panel recommended that this Court issue an order indefinitely suspending Respondent from the practice of law with leave to apply for reinstatement after six months. **App. 588.** Informant accepted the Panel's recommendation. **App. 590-591.** Respondent rejected the Panel's recommendation. **App. 592.**

POINTS RELIED ON

I.

RESPONDENT ENGAGED IN A PROHIBITED BUSINESS TRANSACTION WITH HIS CLIENT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT BY ACQUIRING A SECURITY INTEREST AND ULTIMATELY FORECLOSING ON HIS CLIENT'S PROPERTY UNDER TERMS THAT WERE EXPLOITIVE, UNFAIR AND UNREASONABLE AND INTENDED TO BENEFIT RESPONDENT AT THE EXPENSE OF HIS CLIENT'S FINANCIAL INTEREST.

Rule 4-1.8(a), Rules of Professional Conduct

In re Oliver, 285 S.W.2d 648 (Mo. banc 1956)

In re Snyder, 35 S.W.3d 380 (Mo banc 2000)

In re Lowther, 611 S.W.2d 1 (Mo. banc 1981)

POINTS RELIED ON

II.

RESPONDENT ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND FAILED TO MAKE REASONABLE EFFORTS TO ENSURE THAT HIS SECRETARY'S CONDUCT WAS COMPATIBLE WITH THE RESPONDENT'S PROFESSIONAL OBLIGATIONS BY PERMITTING HIS SECRETARY TO NOTARIZE AND BACKDATE THE FUTURE ADVANCE DEED OF TRUST.

Rule 4-8.4(d), Rules of Professional Conduct

Rule 4-5.3(b), Rules of Professional Conduct

POINTS RELIED ON

III.

SUSPENSION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT WILLIAMS IMPROPERLY ENTERED INTO A BUSINESS TRANSACTION WITH HIS CLIENT UNDER TERMS THAT WERE UNFAIR AND UNREASONABLE AND THAT FAILED TO COMPLY WITH THE REQUIREMENTS OF THE RULES OF PROFESSIONAL CONDUCT BECAUSE:

A. THE COURT HAS RULED THAT ATTORNEYS WHO ENGAGE IN IMPROPER BUSINESS TRANSACTIONS WITH THEIR CLIENTS SHOULD BE SUSPENDED; AND

B. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST SUSPENSION AS THE APPROPRIATE SANCTION.

In re Mills, 539 S.W.2d 447 (Mo. banc 1976)

In re Snyder, 35 S.W.3d 380 (Mo. banc 2000)

In re Lowther, 611 S.W.2d 1 (Mo. banc 1981)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

RESPONDENT ENGAGED IN A PROHIBITED BUSINESS TRANSACTION WITH HIS CLIENT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT BY ACQUIRING A SECURITY INTEREST AND ULTIMATELY FORECLOSING ON HIS CLIENT’S PROPERTY UNDER TERMS THAT WERE EXPLOITIVE, UNFAIR AND UNREASONABLE AND INTENDED TO BENEFIT RESPONDENT AT THE EXPENSE OF HIS CLIENT’S FINANCIAL INTEREST.

A lawyer owes his client the utmost good-faith and the highest loyalty and devotion to his client’s interests. “The relation between attorney and client is highly fiduciary and of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith” on the part of the attorney. *In re Oliver*, 285 S.W.2d 648, 655 (Mo. banc 1956). Respondent breached that duty in this case by taking a security interest in his client’s property without regard to the stringent requirements of Rule 4-1.8(a).

The disciplinary rule is straightforward:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are

fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. S. Ct. Rule 4-1.8(a)

Taking a security interest in a client's property is not, per se, a violation of an attorney's ethical obligations. It is, however, a treacherous minefield to navigate. While an attorney may accept property other than cash in payment of a fee, the acquisition by the lawyer of a proprietary interest in the client's property is subject to "heightened scrutiny" as well as the additional safeguards provided by the notice provisions of Rule 4-1.8(a). *In re Snyder*, 35 S.W.3d 380, 383 (Mo banc 2000).

Here, Respondent acquired a security interest in Mr. Boothe's property known as Lot 9 of Kip's Cove through the execution of a Future Advance Deed of Trust and Security Agreement in September 2009. Upon default in Mr. Boothe's financial obligations to Respondent (i.e., payment of the agreed-upon attorney's fee), the instrument gave Respondent the right to have the subject property sold at public auction to the highest bidder for cash at the Camden County Courthouse. No written explanation of the transaction was presented to his client. Further, the evidence is undisputed that Respondent did not advise his client of the advisability of consulting with and seeking the

advice of independent counsel regarding the business transaction. Nor did the client consent to the terms of the business transaction in a separate writing contemporaneous with the transfer. Finally, the transfer of the subject property, which the client acquired for \$63,500 and which the Camden County Assessor valued at \$46,200, as security for the payment of Respondent's attorney's fee of \$9,682.20 was, on its face, not a "fair and reasonable" transaction.

There is an "inherent danger" in acquiring a personal interest in a client's property. "It is an area wrought with pitfalls and traps and the Court is without choice other than to hold the attorney to the highest of standards." *In re Lowther*, 611 S.W.2d 1, 2 (Mo. banc 1981) (per curiam). The conflicts rule governing transactions between an attorney and his client finds its origin in contracts law: a contract is construed against the drafter and against the one with superior knowledge. Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* 262 (2d ed. 1990). Indeed, it has been the law in this state that, when a client attacks a conveyance from the client to the attorney, the conveyance is presumptively fraudulent, and the attorney bears the burden of proving that the transaction, as well as the conveyance itself, was fair and reasonable in all respects. *Laspy v. Anderson*, 361 S.W.2d 680, 682 (Mo. 1962). Tracking the stringent requirements in the current rule, the case law held it was "essential" that the lawyer make full disclosure to the client of all pertinent information and advice with regard to the transaction. *In re Miller*, 568 S.W.2d 246, 251 (Mo. banc 1978).

The conflicts created by the conveyance of a security interest from Mr. Boothe to the Respondent are just the sort of conflicts of interest that Rule 4-1.8(a) is designed to avoid, to wit:

The business transaction between Respondent and his client was not fair and reasonable. Mr. Boothe acquired the lakefront lot known as Lot 9 of Kip's Cove in September 2008 for a purchase price of \$63,500. At the time of purchase, the property had an appraised value of \$46,200 as determined by the Camden County Assessor. Respondent failed to investigate the value of the subject property in September 2009 (when he took the security interest) to determine whether it was worth less or bore any reasonable relationship to his anticipated attorney's fees for representing Mr. Boothe in his criminal case.

Respondent later foreclosed on the subject property pursuant to the terms of the Future Advance Deed of Trust and purchased the property at the foreclosure sale on January 11, 2011 for \$5,000. After obtaining the Trustee's Deed on the Lot 9 of Kip's Cove, Respondent sold the property to his secretary, Diane Lucash and her husband, for \$15,000.

Respondent's fees and expenses for representing Mr. Boothe with regard to the criminal charges, plus the additional expenses associated with the foreclosure, totaled approximately \$12,000. That included Respondent's fee bill to Mr. Boothe (\$9,682.00), his payment of real estate taxes on the Kip's Cove property for the 2009 tax year (\$398.35) and the 2010 tax year (\$347.96), publication costs for the foreclosure notice (\$184), title costs and Respondent's charge for attorney's fees for the foreclosure.

Respondent testified that he had \$2,000 in foreclosure costs associated with the foreclosure on the Kip's Cove property. **App. 62 (Tr. 139).**

Based upon the foregoing, it is clear that the transaction between Respondent and his client was not fair and reasonable because (i) Lot 9 of Kip's Cove was worth significantly more than the fees and expenses incurred by Respondent in representing Mr. Boothe and in foreclosing on the subject property, and (ii) Respondent made a profit of approximately \$3,000 on the sale of the foreclosed property to his secretary, over and above the fees and expenses incurred in representing Mr. Boothe.

Respondent failed to advise or give Mr. Booth a reasonable opportunity to seek the advice of independent legal counsel. The threat of overreaching inherent in a business transaction between a lawyer and his client is so apparent that Rule 4-1.8(a) requires that the lawyer (i) advise the client in writing of the desirability of seeking and (ii) give the client a reasonable opportunity to seek the advice of independent legal counsel regarding the transaction. The Disciplinary Hearing Panel properly found that Respondent failed to comply with this important requirement.

Mr. Boothe has been considered disabled by the Social Security Administration since he was 22 years old and receives Social Security Disability payments of \$548 per month. Mr. Boothe is disabled because he is bipolar with schizophrenic tendencies. The Panel found that Mr. Boothe is inarticulate, sometimes contradictory and confusing and had little knowledge of the true significance of the legal consequences of his execution of the Future Advance Deed of Trust and Security Agreement in September 2009. **App. 572.** Specifically, despite receiving legal notice of foreclosure from Respondent, Mr.

Boothe was confused and believed that foreclosure on Lot 9 of Kip's Cove would involve a court proceeding wherein a judge would ensure that, at a minimum, proper value was given for the forced sale of the property. **App. 574.**

Respondent never gave Mr. Boothe the opportunity, when executing the Future Advance Deed of Trust, to consult with independent counsel regarding the legal significance of the document he was signing. Had he done so, Mr. Boothe would have understood the full significance of the document and could have considered other remedies or the availability of other counsel to represent him in his criminal case.⁵ At the very least, Mr. Boothe might have come to understand that the subject property could be foreclosed upon by Respondent without judicial proceedings and sold to the highest bidder in order to satisfy the Respondent's attorney's fees and expenses – even if the ultimate foreclosure sale price was significantly less than the purchase price paid for the property by Mr. Boothe and significantly less than the appraised value of the property as determined by the Camden County Assessor.

The Panel correctly found that Respondent failed to give his client critical information, in writing, regarding his right to seek the advice of independent counsel and

⁵ The Disciplinary Hearing Panel noted that, while it is impossible to know what action Mr. Boothe would have taken had he been aware of the right to consult with independent counsel, Mr. Boothe was able to use other property, a motorcycle, to bond out of jail. The Panel correctly concluded that consideration of alternative courses of action that Mr. Boothe might have taken were irrelevant to the Panel's inquiry. **App. 575.**

that Mr. Boothe was damaged by the business transaction with Respondent. **App. 576-577.**

Respondent failed to obtain his client's informed, written consent to the business transaction. Rule 4-1.8(a)(3) requires that the attorney entering into a business transaction with his client obtain the client's informed, written consent to both the essential terms of the transaction and to the lawyer's role in the transaction. This requirement goes hand-in-hand with the requirement that the client be given an opportunity to seek the advice of independent counsel – both conditions seek to ensure that the client is protected from an overreaching attorney and that the client knowingly enters into such a transaction with full knowledge of its consequences. Here, the Panel correctly found that Respondent failed to obtain Mr. Boothe's informed, written consent to giving Respondent a security interest in the property at Lot 9 of Kip's Cove.

The Comment to Rule 4-1.8(a) explains the importance of the informed consent requirement, noting that the lawyer, when necessary, should discuss both the material risks of the proposed transaction and the existence of reasonably available alternatives. See Comment [2] to Rule 4-1.8. The commentary is consistent with the definition of “informed consent” contained in Rule 4-1.0(e) of the Rules of Professional Conduct.

There is a factual dispute as to where and when Mr. Boothe executed the Future Advance Deed of Trust and Security Agreement.⁶ It is clear, however, that Respondent

⁶ Mr. Boothe testified that Respondent brought the Future Advance Deed of Trust and Security Agreement to the jail, placed the document in front of him and told him to sign.

never explained the material risks of the transaction to his client, including the fact that the subject property had a fair market value far in excess of the attorney's fee and expenses to be incurred by Respondent and that the property could be foreclosed upon and sold to the highest bidder without any further court proceedings.

Rule 4-1.8(a) exists because of the recognition that lawyers and clients are in a fiduciary relationship. The lawyer typically has more knowledge and experience. "A lawyer's legal skill and training, together with the relationship of trust and confidence between the lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client..." Comment [1] to Rule 4-1.8. Here, Respondent was an experienced real estate attorney, having owned a title company, water companies, and developed subdivisions. Mr. Boothe was a relatively confused, inarticulate and disabled client who, through an inheritance, happened to own Lot 9 of Kip's Cove free and clear.

By taking a security interest in Lot 9 of Kip's Cove, Respondent put his own financial interests ahead of the interests of his client. Without regard to whether the value of the subject property was equal to the value of his attorney's fees and expenses, Respondent took a security interest that permitted him to foreclose on the property without further process. His client was, at best, unsophisticated and clearly did not

Respondent testified that Mr. Boothe signed the document in Respondent's law office after Mr. Boothe had bonded out of jail. The Panel correctly concluded that the exact time and location when Mr. Boothe executed the document was irrelevant.

understand the significance of the transaction. Rather than fulfill his fiduciary duty as an attorney, Respondent used the attorney-client relationship with Mr. Boothe to his own benefit and placed his own financial interests above those of his client. In so doing, Respondent violated Rule 4-1.8(a).

II.

RESPONDENT ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND FAILED TO MAKE REASONABLE EFFORTS TO ENSURE THAT HIS SECRETARY'S CONDUCT WAS COMPATIBLE WITH THE RESPONDENT'S PROFESSIONAL OBLIGATIONS BY PERMITTING HIS SECRETARY TO NOTARIZE AND BACKDATE THE FUTURE ADVANCE DEED OF TRUST.

There is conflicting testimony as to whether the Future Advance Deed of Trust was signed by Mr. Boothe in the Camden County Jail or at Respondent's law office. There is no dispute, however, that Respondent's secretary, Jennifer Jackson, notarized the document with the following statement appearing thereon:

"On this 8th day of September, 2009, before me, Jennifer Jackson, a Notary Public, personally appeared Robert Boothe, a single person, known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed."

Ms. Jackson testified at the DHP hearing that she has never gone to the Camden County Jail to notarize a document, does not remember Mr. Boothe executing the Future Advance Deed of Trust and Security Agreement at Respondent's law office, and does not know when the document was signed by Mr. Boothe. Ms. Jackson's notary signature book has no listing of a Future Advance Deed of Trust and Security Agreement signed by Mr. Boothe. It does list real estate related documents executed by other persons on dates

both before and after September 8, 2009. There were no pages missing from the notary signature book.

The Panel correctly found that Mr. Boothe's execution of the Future Advance Deed of Trust was not witnessed by a Notary and that Jennifer Jackson later notarized the document and backdated it to September 8, 2009, a date that both Respondent and Mr. Boothe agree was not accurate. The Panel concluded that by directing or permitting Ms. Jackson to notarize and backdate the document, Respondent violated Rule 4-5.3(b) and Rule 4-8.4(d).

Rule 4-5.3(b) requires that a lawyer having direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Rule 4-8.4(d) prohibits a lawyer from engaging in conduct prejudicial to the administration of justice. It is clear that Respondent himself would have been prohibited by the Rules of Professional Conduct from backdating the notarial declaration on the Future Advance Deed of Trust.⁷ Rule 4-5.3 required that Respondent ensure that the conduct of his office staff was consistent with his own professional duties. The Panel correctly found that by directing or permitting his secretary to backdate the document, Respondent violated Rules 4-5.3(b) and 4-8.4(d).

⁷ Such conduct by Respondent would have been dishonest and deceitful in violation of Rule 4-8.4(c)

III.

SUSPENSION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT WILLIAMS IMPROPERLY ENTERED INTO A BUSINESS TRANSACTION WITH HIS CLIENT UNDER TERMS THAT WERE UNFAIR AND UNREASONABLE AND THAT FAILED TO COMPLY WITH THE REQUIREMENTS OF THE RULES OF PROFESSIONAL CONDUCT BECAUSE:

- A. THE COURT HAS RULED THAT ATTORNEYS WHO ENGAGE IN IMPROPER BUSINESS TRANSACTIONS WITH THEIR CLIENTS SHOULD BE SUSPENDED; AND**
- B. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST SUSPENSION AS THE APPROPRIATE SANCTION.**

In determining a sanction for attorney misconduct, this Court historically relies on three sources. First and foremost, the Court applies its own standards to maintain consistency, fairness, and ultimately, to accomplish the well-established goals of protecting the public and maintaining the integrity of the profession. Those standards are written into law, of course, when the Court issues opinions in attorney discipline cases. *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003).

For additional guidance, the Court frequently relies on the ABA's Standards for Imposing Lawyer Sanctions (1991 ed.). Those guidelines recommend baseline discipline for specific acts of misconduct, taking into consideration the duty violated, the lawyer's

mental state (level of intent), and the extent of injury or potential injury. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). Once the baseline guideline is known, the ABA Standards allow consideration of aggravating and mitigating circumstances. ABA Standards for Imposing Lawyer Sanctions (1991 ed.).

The Court also considers the recommendation of the Disciplinary Hearing Panel that heard the case. In this instance, the Panel recommended that Respondent be suspended indefinitely with leave to apply for reinstatement after six months. **App. 588.**

The Missouri Standard

It is well settled that the nature of a lawyer's profession necessitates the utmost good faith and the highest loyalty and devotion to his client's interests. "The relation between attorney and client is fiduciary and binds the attorney to a scrupulous fidelity to the cause of the client which precludes the attorney from any personal advantage from the abuse of that reposed confidence." *Shaffer v. Terrydale Management Corporation*, 648 S.W.2d 595, 605 (Mo.App. 1983).

This Court has had prior opportunities to address several of the issues in this case, including the appropriate sanction for attorneys found to have engaged in self-dealing. In 1976, the Court entered an indefinite suspension order, with leave to apply for reinstatement after one year, in a case in which the attorney took advantage of his fiduciary relationship with his ward to sell the ward's land. *In re Mills*, 539 S.W.2d 447, 451 (Mo. banc 1976). The Court explained that it was inconsequential, for disciplinary purposes, that the lawyer did not profit from the sale and that both the ward and his mother wanted to buy the property. *Id.* at 449.

In 1981, the Court indefinitely suspended another lawyer who engaged in improper financial transactions with his client. He, too, was not permitted to apply for reinstatement until a year had passed. *Matter of Lowther*, 611 S.W.2d 1 (Mo. banc 1981). The Court explained the inherent danger in self-dealing as follows:

“The attorney, with his superior knowledge and education, can pursue this course only at his peril. It is an area wrought with pitfalls and traps and the Court is without choice other than to hold the attorney to the highest of standards under such circumstances.” *Id.* at 3.

In *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2000), the attorney acquired adverse pecuniary interests in his clients’ respective residential properties. Specifically, the attorney took a quit claim deed from one client and a deed of trust from another client in order to secure payment of his attorney’s fees in two criminal representations. The Court indefinitely suspended Snyder with leave to apply for reinstatement after six months, noting that the transactions violated Rule 4-1.7 and 4-1.8(a) and were subject to “heightened scrutiny and notice requirements.” *Id.* at 383. The Court noted that suspension was the appropriate sanction because Snyder constructed fee arrangements that created pecuniary interests in derogation of the attorney-client fiduciary relationship. *Id.* at 385.

Here, Respondent engaged in conduct as serious as that involved in the *Snyder* case. He took a security interest in his client’s property without advising the client in writing of the desirability of seeking and being given a reasonable opportunity to seek the advice of independent counsel before Mr. Boothe, his client, executed the Future

Advance Deed of Trust. Since Mr. Boothe was not advised in writing of the desirability of seeking independent counsel, he could not give informed consent to the essential terms of the transaction between himself and Respondent.

Respondent's conduct following the foreclosure on the subject property demonstrates the need for "heightened scrutiny" of the transaction with his client. Respondent purchased the property himself at the foreclosure sale on January 11, 2011 for \$5,000. After obtaining title to the property, he sold the property approximately five months later to his secretary and her husband for \$15,000. Respondent did not advertise the subject property for sale, did not have a realtor, did not list the property for sale on the internet or in the newspaper and did not have the property appraised before the sale to his secretary and her husband. The evidence established that the sale price exceeded Respondent's attorney's fees and foreclosure expenses and that he actually profited from the sale of his client's property to his secretary.

ABA Guidelines

This Court has often relied on sanction guidelines developed by the ABA's Center for Professional Responsibility. *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994). The guidelines, known as the ABA Standards for Imposing Lawyer Sanctions (1991 ed.), consider the following primary questions:

- (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
- (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

- (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and
- (4) Are there any aggravating or mitigating circumstances?

ABA Standards: Theoretical Framework (p. 5).

The ABA Standards "assume that the most important ethical duties are those obligations which a lawyer owes to clients." ABA Standards: Theoretical Framework (p. 5). Application of the ABA Standards requires the user to first analyze the first three questions and then, only after a baseline sanction is apparent, to consider aggravating and mitigating circumstances. ABA Standards, Preface: Methodology (p. 3). The drafters intentionally rejected an approach, however, that focused only on a lawyer's intent. Instead, they recognized that sanctioning courts must consider not only the attorney's intent and damage to his client, but also the damage to "the public, the legal system and the profession." ABA Standards Preface: Methodology (p.3).

ABA Baseline Sanction: Suspension

Having considered that background, the application of these ABA Standards to the case at bar must start with Standard 4.32: **Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict and causes injury or potential injury to a client.** ABA Standard 4.32. That standard must be the starting point because mitigating and aggravating circumstances are only considered after a baseline standard is determined.

And, that standard must be the applicable baseline because the evidence established the following:

- Duty violated. Respondent knew or should have known that by entering into a fee agreement that included his client giving him a Future Advance Deed of Trust, that he was in a conflict of interest position in violation of Rule 4-1.8(a). The duty violated was Respondent's obligation to his client to avoid financial transactions that violated Rule 4-1.8(a).
- State of mind. The Panel correctly found that Respondent acted with knowledge. **App. 584**. Specifically, Respondent was aware of his client's circumstances in jail, the fact that the client owned property free and clear and that his client was operating under a mistaken understanding that his property could not be foreclosed upon without further judicial action.
- Client injury. There can be no doubt that the client was injured by the Respondent's misconduct. Mr. Boothe lost title to a parcel of property for which he had paid \$63,500, that he owned free and clear and that was valued far in excess of the amount paid by Respondent at the foreclosure sale.

After determining the baseline sanction, the ABA Standards permit the Court to consider applicable aggravating and mitigating circumstances. The Panel correctly found that the following aggravating factors were relevant in this case:

- Prior disciplinary offenses. Respondent received an admonition in 2001 for violation of Rule 4-1.9(a), a conflict of interest involving a former client. **App. 226-227.**

- Refusal to acknowledge the wrongful nature of the conduct. Respondent has insisted throughout these disciplinary proceedings that Rule 4-1.8 does not apply to the transaction with Mr. Boothe.
- Vulnerability of the victim. Mr. Boothe was in a vulnerable position, in jail without liquid assets. In addition, Mr. Boothe was on full Social Security disability for bipolar disorder with schizophrenic tendencies.
- Substantial experience in the practice of law. Respondent received his law license in 1984 and has extensive experience in real estate matters, including ownership of a title company and development of subdivisions.
- False statements during the disciplinary process. Respondent initially advised the Office of Chief Disciplinary Counsel that Mr. Boothe executed the Future Advance Deed of Trust while in jail on September 8, 2009. He later testified in detail at the Disciplinary Hearing Panel proceeding that the document execution occurred at a later time and place.

In mitigation, the Panel found evidence of Respondent's good character and reputation, noting that Dana Martin, a lawyer formerly associated with Respondent, testified that Respondent has a reputation in criminal cases for spending sufficient time working with clients, for attempting to work with clients on receipt of payment of fees and for being a good and ethical attorney in those cases. In summary, the Panel found that aggravating factors outweighed mitigating factors.

On the basis of its analysis of this Court's decisions and the guidance provided by the ABA Standards for Imposing Lawyer Sanctions, the Panel recommended that

Respondent be suspended indefinitely with leave to apply for reinstatement after six months. Informant concurs in the Panel's well-reasoned recommendation.

CONCLUSION

Respondent committed professional misconduct by taking a pecuniary interest in his client's property under terms that were not fair and reasonable to his client in order to financially benefit at the expense of his client. He did so without following the specific requirements set forth in Rule 4-1.8(a), requirements intended to protect the interests of the client. In carrying out his scheme, Respondent exacerbated the damage by directing or permitting his secretary to backdate the Future Advance Deed of Trust in violation of Rules 4-5.3(b) and 4-8.4(d). The presence of significant aggravating circumstances, including Respondent's refusal to take responsibility for, or even acknowledge, the nature and extent of his wrongdoing, require suspension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2013, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 8,914 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Alan D. Pratzel

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